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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71—

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD RUSSELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit reversing a conviction for manufacturing and selling a prohibited drug on the ground that, even though respondent was predisposed to commit the offenses with which he was charged, the conduct of the federal undercover agent in supplying an ingredient for manufacture of the prohibited drug constituted "an intolerable degree of governmental participation in the criminal enterprise."

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App., *infra*, pp. 12-21) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 22) was entered on April 6, 1972. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the circumstances of this case the fact that a government agent furnished means for the commission of an offense, which the defendant was predisposed to commit, and did commit, affords a defense against conviction.

STATEMENT

After a jury trial with co-defendant Patrick Connolly in the United States District Court for the Western District of Washington, respondent was convicted of having unlawfully manufactured and processed methamphetamine, in violation of 21 U.S.C. 331 (Supp. V) (q)(1) and 360a(a), and of having unlawfully sold and delivered that drug, in violation of

(1964ed. Supp V)

21 U.S.C. 331(q)(2) and 360a(b).[1] Respondent was sentenced to six months' imprisonment to be followed by three years' probation. On appeal the court reversed the convictions, one judge dissenting (App., *infra*, pp. 12-21).

1. The evidence showed that on December 7, 1969, Agent Shapiro of the Federal Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, met with respondent and his co-defendants, Patrick Connolly and John Connolly, at the respondent's home on Whidbey Island, Washington (Tr. 4-5).[2] Shapiro told them that he represented an organization in the Pacific Northwest interested in controlling the manufacture of methamphetamine; that he wanted to purchase methamphetamine from them; and that he would supply the phenyl-2-propanone, one of the chemicals necessary to the manufacture of the drug, in return for one-half the amount of methamphetamine produced (Tr. 5-6). Patrick Connolly told Shapiro that he had been manufacturing methamphetamine since May 1969 and had produced about three pounds of that drug (Tr. 7). Shapiro indicated that before he furnished any phenyl-2-propanone he wished to see their laboratory and a sample of their methamphetamine (Tr. 7-8). John

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[1] The indictment was in five counts but only three charged respondent. Patrick Connolly was convicted on all five counts; John Connolly was also named as a defendant but did not appear for trial.

[2] "Tr." refers to the transcript of proceedings at trial, which the government has lodged with the Clerk of this Court.

Connolly then gave Shapiro a bag containing a quantity of methamphetamine, indicating that it was from "the last batch that we made" (Tr. 8), and shortly thereafter Shapiro left with Patrick Connolly to view the laboratory, which was located in the latter's home on Whidbey Island (Tr. 8, 69-70). In the laboratory Shapiro saw an empty bottle labeled phenyl-2-propanone (Tr. 9).

On the evening of December 9, 1969, Shapiro met with Patrick Connolly and respondent at the laboratory (Tr. 19-20). Respondent and Connolly prepared a large flask with pieces of aluminum foil and other chemicals* (Tr. 20-21). At Connolly's request, Shapiro provided him with a bottle containing 100 grams of phenyl-2-propanone, which Connolly added to the flask (Tr. 21-22). During that night, Connolly and respondent manufactured a batch of methamphetamine (Tr. 22-24, 104). Shapiro received part of the drug pursuant to their agreement and the rest was given to respondent (Tr. 24, 27-29). Shapiro later purchased some of respondent's portion of the methamphetamine for $60 (Tr. 31).

On January 7, 1970, Shapiro met again with Patrick Connolly and asked if he was still interested in their "business arrangement" (Tr. 33). Connolly said that he was but that he had recently acquired two bottles of phenyl-2-propanone from a different source and would not be finished with those for a

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* Shapiro put in several pieces of foil that had fallen to the floor but did not otherwise participate in the manufacturing process or direct the work (Tr. 71, 87).

few days (*ibid.*). Shapiro obtained additional methamphetamine from Connolly at that time (Tr. 33-34, 103-104). On January 10, 1970, Shapiro returned to Connolly's residence with a search warrant and seized, among other items, an empty 500 gram bottle of phenyl-2-propanone and a 100 gram bottle partially filled with phenyl-2-propanone (Tr. 35, 46, 50, 95-96). The 100 gram bottle was not the one previously supplied by Shapiro (Tr. 50).

Agent Shapiro testified on cross-examination that a number of chemical supply firms had voluntarily ceased selling phenyl-2-propanone at the request of the Federal Bureau of Narcotics and Dangerous Drugs, and that the chemical may have been generally difficult to obtain around December 9, 1969 (Tr. 81). Both Shapiro and a government chemist testified that phenyl-2-propanone is an essential ingredient in the method used by respondent and Connolly to manufacture methamphetamine (Tr. 84-85, 112-113).

Respondent did not testify or introduce any evidence. He made motions for acquittal based on a claim of entrapment which were denied (Tr. 114-118, 161).[4] Patrick Connolly testified and admitted having told Shapiro that he had manufactured three

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[4] The district judge gave the Ninth Circuit's approved instruction on entrapment, which admonished the jury to acquit if under the evidence it had a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offenses * * * and did so only because he was induced or persuaded by some officer or agent of the government" (Tr. 179-180).

pounds of methamphetamine prior to the meetings with Shapiro, although he asserted that his statement had been untrue (Tr. 148-149).

2. Notwithstanding the fact that respondent had harbored a predisposition to commit the offense (App. *infra*, pp. 13, 18), the court of appeals reversed respondent's conviction on the ground that the fact that a federal undercover agent supplied an ingredient needed to manufacture the illicit drug constituted "an intolerable degree of governmental participation in the criminal enterprise" (App., *infra*, p. 14). This determination was apparently based upon the factual assumption that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the government's supply of one of the essential ingredients." (App., *infra*, p. 13).

The court developed two alternative legal theories to support its conclusion. First, the court reasoned that governmental furnishing of the means of committing a charged offense constitutes entrapment as a matter of law even if the defendant was predisposed to engage in the criminal activity (App., *infra*, pp. 14-15). Second, assuming arguendo that such a predisposition would vitate the traditional defense of entrapment, the court reasoned that such "overzealous law enforcement" contravened "fundamental concepts of due process" (App., *infra*, pp. 15-17).

Judge Trask, dissenting, disapproved of the majority's "unnecessary effort to enlarge the doctrine of entrapment beyond the limitations of * * * *Sherman* v. *United States* * * *" (App., *infra*, p. 21), and em-

phasized that the majority's factual assumptions were not supported by the record, since respondent had obtained phenyl-2-propanone for the manufacture of methamphetamine from sources of his own both before and after being supplied by the government agent (App., *infra*, pp. 18-21).

REASONS FOR GRANTING THE WRIT

The issue in this case is of fundamental importance to the conduct of legitimate investigations into criminal activity. The decision below that a defense of entrapment may be based solely on governmental conduct conflicts with the decisions of this Court in *Sherman* v. *United States*, 356 U.S. 369, and *Sorrells* v. *United States*, 287 U.S. 435. Insofar as the decision rests on the due process clause of the Fifth Amendment, it presents a novel question of federal law which should be settled by this Court. Proper police investigations will be unduly hampered by recognition of this new defense against prosecution which is defined only by the vague and subjective test enunciated by the court of appeals.

1. The underlying rationale of the doctrine of entrapment is that "statutes • • • [ought not] to be enforced by tempting *innocent* persons into violations." *Sherman* v. *United States*, 356 U.S. 369, 372 (emphasis added). The Court there further noted that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Ibid.* In making this determination,

"[t]he predisposition and criminal design of the defendant are relevant." *Sorrells* v. *United States*, 287 U.S. 435, 451. Thus this Court has delineated the boundaries of the entrapment defense by looking to "a general intention or predisposition to commit * * * crimes of the kind solicited * * * rather than the conduct of the police * * *." *Sherman* v. *United States*, *supra*, at 382 (concurring opinion of Mr. Justice Frankfurter).

In this case, respondent, who was engaged in a course of criminal conduct both before and after the commission of the offense charged here, "candidly concedes that he may have harbored a predisposition to commit the charged offenses" (App., *infra*, p. 13). The court below nevertheless disregarded respondent's criminal predisposition and recognized a defense based solely upon the conduct of the government. In so doing, it departed from the entrapment guidelines set forth by this Court in *Sherman* and *Sorrells*. Moreover the decision below contributes to a growing conflict among the courts of appeals, compare *United States* v. *Mascia*, 447 F.2d 1111 (C.A. 2), with *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5).

Implicit in the court's entrapment analysis is the argument that *Sherman* and *Sorrells* may be distinguished as involving only solicitation and not the furnishing of means. However, this Court in *Sorrells* foreclosed such arguments by emphasizing that where a criminal predisposition is found to exist, "the fact that officers or employees of the Government merely afford opportunities or facilities for the com-

mission of the offense does not defeat the prosecution." 287 U.S. at 441. The term "facilities" encompasses the situation where, as here, in dealing with an individual who intends on his own to perfrom a criminal act, the government furnishes part of the means by which to do so.

2. Insofar as the decision below holds that the due process clause of the Fifth Amendment bars prosecution when there has been a certain degree of governmental participation in the criminal enterprise, it is without support in the decisions of this Court.[8] The Ninth Circuit attempted to justify its decision by reference to Mr. Justice Frankfurter's concurrence in *Sherman*, which was based on this Court's "supervisory jurisdiction over the administration of criminal justice" (356 U.S., at 381), but the theory of that concurrence was not accepted by a majority of this Court. And the broad defense recognized by the court below goes far beyond the finely articulated standard Mr. Justice Frankfurther suggested. He urged that in providing a defense based solely upon governmental conduct the Court should look to wheth-

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[8] *Raley* v. *Ohio*, 360 U.S. 423, cited by the court below, involved government advice to witnesses that they were privileged to refuse to answer questions under the privilege against self-incrimination followed by government prosecution for their failure to answer because the privilege was not available. The court held it a denial of due process to convict a witness who justifiably relied on mistaken advice by government officials that he was constitutionally privileged to remain silent. The case is far removed from the claim of entrapment as a defense to conviction for the performance of criminal acts.

er the behavior of the government agent was likely to result in the commission of crime only by "those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise * * * and not [by] others who would normally avoid crime." *Id.*, at 383-384. The action of the government agent here in offering to furnish phenyl-2-propanone in exchange for one-half of the methamphetamine to be manufactured therewith would certainly not seem to be such as to persuade one who would normally avoid that type of crime.

The decision below not only creates a novel defense based solely on governmental conduct, it creates a defense which is excessively broad and vague. Without close consideration of the precise nature of the government's conduct, the court below excused the commission of a crime with the general assertions that this was a case of "overzealous law enforcement," of "intolerable" or "repugnant" behavior of the government agent. Yet, the government agent here did not make repeated solicitations; he made no threats and engaged in no acts of coercion. The chemical he supplied was not an illicit substance, and although it was relatively difficult to obtain, respondent and his co-defendants had obtained it prior to the commission of the offense charged here and were able to do so subsequently as well. Aside from supplying the phenyl-2-propanone the government agent lent no aid to respondent's illegal venture; respondent and his co-defendants provided the other ingredients, the labor,

and the equipment needed to produce the methamphetamine. It therefore cannot be said that the government's involvement in respondent's criminal enterprise was either reprehensible or violative of the requirements of due process.

By creating an ambiguous, subjective standard for a defense based on improper governmental conduct the court below has placed a substantial obstacle in the path of proper investigations into criminal activity. The standards seemingly adopted by the court below—whether the degree of governmental participation in the criminal enterprise was "intolerable" or the conduct of the agent "repugnant" (see App., *infra*, at pp. 14, 17)—are inherently vague and certainly not susceptible to ready application in the course of legitimate undercover work. Furthermore, this transformation of the defense of entrapment into a shield for the criminally predisposed poses a threat to effective law enforcement generally.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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JUNE 1972.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 26,485

UNITED STATES OF AMERICA, APPELLEE

vs.

RICHARD RUSSELL, APPELLANT

[April 6, 1972]

Appeal from the United States District Court for the Western District of Washington Northern Division

Before: KOELSCH, ELY and TRASK, Circuit Judges.

ELY, Circuit Judge.

Russell was convicted on three counts of violating the Federal Food and Drug Laws in manufacturing, processing, delivering, and selling a prohibited depressant or stimulant drug, methamphetamine. 21 U.S.C. §§ 331(q)(1), (2); 360a(a), (b). In this appeal, Russell urges that the participation of a Government Agent in the crimes was so overreaching as to constitute entrapment as a matter of law.

In December, 1969, a Special Agent of the Bureau of Narcotics and Dangerous Drugs met with Russell and several of the latter's codefendants. The Agent claimed that he represented an organization anxious to control the manufacture and distribution of meth-

amphetamine in the Pacific Northwest, and he offered to supply the chemical Phenyl-2-Propanone in exchange for one-half of the methamphetamine to be manufactured therewith. An agreement was reached, and several days later, the Agent provided the Phenyl-2-Propanone, and the methamphetamine was produced with the Agent's assistance. He received his share and also purchased an additional amount of the finished product from Russell.

The challenged conduct on the part of the Government's Agent was the supplying of the Phenyl-2-Propanone, a chemical essential to the manufacture of methamphetamine. The Agent himself testified that this chemical was difficult to obtain because one must have a manufacturer's license to purchase it at a chemical supply house and because many suppliers were, at the request of the Bureau of Narcotics, no longer selling it at all. Thus, there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients.

While Russell candidly concedes that he may have harbored a predisposition to commit the charged offenses, he contends that he may still avail himself of the entrapment defense. Principally, he relies upon the concurring opinions of Justices Frankfurter and Roberts in *Sherman* v. *United States*, 356 U.S. 369, 378-85 (1958), and *Sorrells* v. *United States*, 287 U.S. 435, 453-59 (1932). These opinions propose a test for entrapment that focuses, not on the intent of the accused, but on the conduct of the Government:

> "The crucial question, not easy to answer, to which the court must direct itself is whether the police conduct revealed in the particular case

> falls below standards, to which common feelings respond, for the proper use of governmental power."

Sherman v. *United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

The basic contention of the Government, in response to Russell's claim, is premised on the following statement of our court, drawn from the majority opinions in *Sherman* and *Sorrells*:

> "Entrapment is shown where Government agents go beyond the mere affording of opportunities or facilities for the commission of the offense and exert persuasion of one kind or another which induces the commission of a crime by one who has no predisposition to do so."

United States v. *Walton*, 411 F.2d 283, 288 (9th Cir. 1969). The Government argues that the plain import of this language is that one altogether forfeits an entrapment defense if he is "predisposed" to commit the crime.

We need not resolve the precise issue apparently presented by the parties. For regardless of the significance of "predisposition" as an element in "entrapment," we conclude that there is merit in Russell's contention that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise. Two theories for this defense have been advanced. Placing the defense within the ambit of the entrapment doctrine was the approach taken by our learned Brothers of the Fifth Circuit in *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971), and by District Judge Ferguson in his very carefully written opinion

in *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

The facts of *Bueno* and *Chisum* are remarkably similar to those presented here. In *Bueno*, the defendant was supplied heroin by a government informer, but was nonetheless convicted for selling the same heroin to the Government Agent for whom the informer apparently was working, the sales having been arranged by the informer. In *Chisum*, the defendant was supplied counterfeit money by a Government Agent and then indicted for receiving the counterfeit bills with intent to pass them as genuine. In each case the court held that since the Government had supplied the defendant with the contraband, the defendant was entrapped as a matter of law, regardless of the accused's predisposition to commit the crime.[1]

The facts of the present case cannot fairly be distinguished from those of *Bueno* and *Chisum*. While it is true that Russell and his codefendants were supplied with only one ingredient of the illicit drug, that ingredient was as essential to the perpetration of Russell's alleged crimes as was the heroin in *Bueno* and the counterfeit money in *Chisum*. Russell would have been powerless to "commit" the charged offense without the Government's pervasive intervention.

The Government, in effect, contends that we are not free to adopt the *Bueno-Chisum* reasoning. Assuming, *arguendo*, that the Government is correct[2]

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[1] Both courts cited with approval the similar decision of the Illinois Supreme Court in *People* v. *Strong*, 21 Ill. 2d 320, 172 N.E.2d 765 (1961).

[2] Recent cases indicate that the contrary is true. Another panel of our court, after noting the existence of divergent

in its assessment of *Walton*, *supra*, as limiting the applicability of the "entrapment" defense to instances in which the defendant had no predisposition to commit the crime, an approach other than that relating to the strict "entrapment" defense requires reversal. Judge Hamley, the author of the *Walton* opinion, recently articulated the rationale underlying this alternative approach:

> ". . . although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to a level of *"creative* activity" (*Sherman*, *supra*, at 372), substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined."

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views concerning the basis of the entrapment doctrine, has written that "the fact remains that it is the unbecoming conduct of the Government which calls the defense of entrapment into play." *United States* v. *Arcenaux*, 437 F.2d 924, 925 (9th Cir. 1971). *Cf. United States* v. *Bueno*, 447 F.2d 903, 906 (5th Cir. 1971); *United States* v. *Chisum*, 312 F. Supp. 1307, 1310 (C.D. Cal. 1970).

We also note that Judge Hamley, the author of the *Walton* opinion, upon which the Government relies in urging that lack of predisposition is an essential element of a successful entrapment defense, recently indicated that such is true only in "the usual entrapment defense." *Greene* v. *United States*, —— F.2d ——, —— (9th Cir. Nov. 23, 1971).

Greene v. *United States*, 454 F.2d 783 (9th Cir. Nov. 23, 1971).[4]

The holding of *Greene*, however, was limited to the unique circumstances there involved. The Government Agent in that case alternately prodded, threatened, encouraged, and aided the defendants in manufacturing and supplying him with bootleg whiskey. The conduct of the Agent in Russell's case was, hopefully, also unique; certainly it was equally repugnant, if not more so, than the conduct of the Agent in *Greene*. Thus, under the *Greene* rationale also, reversal is required.

Apparently, the only difference between *Bueno* and *Chisum*, as distinguished from *Greene*, is the label affixed to the result. Both theories are premised on fundamental concepts of due process [5] and evince the reluctance of the judiciary to contenance "overzealous law enforcement." [6] We do not choose to affix a label to our result; hence, we need not select between the alternative theories. Here, both compel the same disposition.

Upon remand, the indictment will be dismissed.

Reversed, with directions.

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[4] See also *Notaro* v. *United States*, 363 F.2d 169, wherein, at 178, we wrote: "It . . . [is] . . . not thought right or just that a Government should instigate and successfully pursue prosecution for the commission of an act which the prosecuted would not likely have committed but for the importunity of an Agent of the Government itself.

[5] *See Raley* v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959), discussed in *United States* v. *Chisum*, 312 F. Supp. 1302, 1310 (C.D. Cal. 1970).

[6] *Sherman* v. *United States*, 356 U.S. 369, 381, 78 S. Ct. 819, 825, 2 L. Ed. 2d 848, 856 (1958) (Frankfurter, J., concurring).

TRASK, Circuit Judge (dissenting):

The majority reverses this judgment of conviction upon the ground that the "participation of a Government Agent in the crimes was so overreaching as to constitute entrapment as a matter of law." I respectfully disagree.

The case was tried to a jury and the court sustained the verdict and rendered judgment thereon. There is no question but that Russell did the things he was charged with doing. In his brief to this court he states:

> "The jury was instructed as to the law on entrapment as set forth in *Notaro* v. *U.S.*, 363 F.2d 169, (1966, 9th Cir.) and *Walton* v. *U.S.*, 411 F.2d 283 (1969, 9th Cir.), and concededly here we do not have an issue of propensity, because the defendant through hearsay statements stated that he did sell speed and associated with Connolly who manufactured speed. The jury could find from the testimony that the government had not unlawfully entrapped Russell and that Russell did commit the acts as charged. There is no question that Russell committed the acts." Appellant's Brief at 7.

There was no error claimed in any instruction given or refused. The "overreaching participation" relied upon by the majority is the conduct of the government in supplying Phenyl-2-Propanone to the defendant and his fellow manufacturers. This chemical is essential to the manufacture of methamphetamine. The opinion states that it could not have been obtained had the government agent not supplied it. I would disagree with the rationale of the majority assuming its recital of facts is correct. I particularly

dissent when the facts as I read them completely fail to support the factual recitals upon which the opinion is based. The thesis is that the three individuals involved would not have been able to manufacture the product and sell it without the chemical from the government. The crimes charged occurred in early December, 1969. At one of the meetings which occurred on December 7 between the undercover agent and one of the three, the agent testified to a conversation at Russell's house:

> "He [Connolly] stated to me he had been manufacturing methamphetamine since May of 1969, that since May, up to that time, he had manufactured approximately three pounds of methamphetamine. . . ."
>
> * * *
>
> "At that time John Connolly handed me a small plastic bag containing a white powder. John Connolly stated to me 'This is the last batch that we made.'"[1]

The government did not supply any of the ingredients for this drug.

The government agent whose conduct is in question because he offered to supply Phenyl-2-Propanone in return for part of the methamphetamine, also testified:

> "THE COURT: I have a question. It was yesterday when you were testifying, Mr. Shapiro, and I am not quite sure in my own mind what

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[1] R.T. at 7-8. Patrick Connolly admitted that he had told the agent they had made three pounds since May but denied that his story was true. R.T. at 149. He also admitted that John Connolly handed the agent a sample. R.T. at 149.

you said, but did I understand you to testify that you offered to bring more Propanone, and that one of the defendants said they didn't want it, because they had their own, or something to that effect:

"THE WITNESS: That conversation took place on January 7, 1970.

"THE COURT: That they had their own?

"THE WITNESS: Yes, sir, Mr. Connolly stated that to me.

"THE COURT: Are there any other bottles of Propanone among these exhibits, except the one with the corners folded down.

"THE WITNESS: There was that one, and there was an empty bottle with a Phenyl-2-Propanone label on it, and there was a second bottle approximately half full.

"THE COURT: Of Phenyl-2-Propanone in these exhibits?

"THE WITNESS: Yes, sir."*

It is clear from this testimony that while Phenyl-2-Propanone may have been difficult to obtain, it had been obtained in the past without the assistance of the government agent. We are required in this situation to view the evidence, and all reasonable inferences therefrom, in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Halprin*, No. 71-2146 (9th Cir. Oct. 20, 1971). Accepting that as true, it is correct that the appellant did use the necessary chemical supplied by the government agent on the date of manufacture for which he was convicted. It is not correct that it was impossible or even difficult for the

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*R.T. at 95-6.

defendant and his co-conspirators to obtain it from their own sources of supply. Under these circumstances it can hardly be argued that there was an "intolerable degree of governmental participation in the criminal enterprise."

Apart from my disagreement based upon the facts, I disapprove of what appears to me to be an unnecessary effort to enlarge the doctrine of entrapment beyond the limitations of the opinion of the Court in *Sherman* v. *United States*, 356 U.S. 369, and place this court among the minority who espouse the "governmental conduct" approach. *See United States* v. *Tatar*, 439 F.2d 1300, 1303 (9th Cir. 1971).

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 26485

DC # 51877-Crim.

UNITED STATES OF AMERICA, APPELLEE

v.

RICHARD RUSSELL, APPELLANT

APPEAL from the United States District Court for the Western District of Washington.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with directions.

Filed and entered April 6, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE, 1972 467-575 797